United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1468

United States Court of Appeals

For the Second Circuit

Docket No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Plaintiff,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

and Consolidated Cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRANDENBURG APPELLANTS' PETITION FOR REHEARING IN BANC

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BRANDENBURG APPELLANTS' PETITION FOR REHEARING IN BANC

Introduction

Brandenburg plaintiffs[1] respectfully petition for rehearing before the entire Court in banc. Two clear and basic errors of law in the majority opinion handed down June 25, 1975, create a direct conflict with leading decisions of this Court, and with a recent amendment to the Rules of Civil Procedure for the United States District Courts:

> I. *The majority opinion directly conflicts with Rule 44.1 of the Federal Rules of Civil Procedure (in effect since July 1, 1966) which provides that foreign law is ruled upon as a matter of law (not fact), and is determined by "any relevant material or source."*
>
> II. *The majority opinion is in direct conflict with this Court's landmark 1951 decision,[2] which expressly rejected the previously applied English rule that a shipowner's "duty to mark a wreck ceases once the Coast Guard has undertaken the task."*[3]

Brandenburg appellants now request rehearing in banc because these two basic, crucial errors of law prevented the majority opinion from reaching or considering the central point on appeal: that a plaintiff may not be removed, in the name of an inconvenient forum, from a jurisdiction granting him a remedy to one that grants him none.

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1. Plaintiffs and Appellants Hapag-Lloyd A.G. (73 Civ. 166 below), and Stork Amsterdam N.V., Industrias Lacteas Dominicanas, S.A. "Indulac" *et al.*, (73 Civ. 182 below).

2. *Berwind-White Coal Mining Co.* v. *Pitney*, 187 F. 2d 665, 669 (2 Cir., 1951), which held that ". . . the mere fact that the Coast Guard undertakes a search *does not relieve the owner of liability* for failure to make all reasonable efforts to mark." (emphasis added).

3. This English rule was erroneously stated in the majority opinion as the present U.S. general maritime law (Majority Opinion, note 6, p. 4384), despite *Berwind-White's* specific rejection of the English rule, 187 F. 2d at p. 669.

The cornerstone of the doctrine of *forum non conveniens* is justice. Brandenburg plaintiffs' basic point on this appeal is that justice requires retention of jurisdiction here, since this forum gives plaintiffs a remedy (for Texaco defendants' negligent failure to locate and mark their wreck) which *does not exist at all* in England. A finding that "the law of the other forum" does not permit "recovery for the wrong libellant alleges * * * should result in an automatic assumption of jurisdiction."[4]

POINT I

The majority opinion directly conflicts with Rule 44.1 of the Federal Rules of Civil Procedure, in effect since July 1, 1966, which provides that foreign law is ruled upon as a matter of law (not fact) and is determined by "any relevant material or source."

The District Court did not even make a finding[5] on a central, crucial question below (and on appeal): whether the duty of an owner to mark his wrecked vessel does in fact differ under the general maritime law as applied by the English and American Courts. The majority opinion erroneously states that a holding on this crucial issue would have been improper below, "because foreign law is a *question of fact*, which must be proved by expert testimony"[6] (emphasis added).

The authority cited for this formerly correct principle is a 1949 decision of this Court.[7] This was however completely changed by the adoption on July 1, 1966 of new Federal Rule of Civil Procedure 44.1, which reads in pertinent part:

> "The court, in determining foreign law, may consider *any relevant material or source* . . . whether or not . . . admissible under Rule 43. The court's

4. *Heredia* v. *Davies*, 7 F. 2d 741, 742 (E.D. Va., 1925), *aff'd.* 12 F. 2d 500, 501 (4 Cir., 1926), *per* Professor A. M. Bickel, *Forum Non Conveniens in Admiralty*, 35 Cornell Law Quarterly 12, at 28 (1949).

5. Majority Opinion, page 4383, footnote 6.

6. *Id.*

7. *Usatorre* v. *The Victoria*, 172 F.2d 434, 438-9 (2 Cir. 1949).

determination shall be treated as a ruling on a *question of law*" (emphasis added).

There is thus no longer any requirement whatsoever for expert testimony, or for *any* evidence. The "relevant material" submitted to establish this crucial "question of law" consisted of the leading decisions of the English Court of Appeal, and of the Privy Counsel of the House of Lords.[8] Under F.R.C.P. Rule 44.1, this is an entirely appropriate way to establish the English law.

Further relevant material supporting Brandenburg Appellants' interpretation of these leading English authorities is found in *Marsden*,[9] the leading English authority on collision law:

> ". . . if the owner or person in possession of the wreck proves that the wreck, though unmarked and unlit, was so through no negligence on his part, he is not liable. Thus, in *The Douglas*, it being proved that notice of the wreck had been given to the river authority having power to remove wrecks, it was held that the owner was not liable for a collision caused by the wreck being unlit. In such cases the owners of the wreck can, without abandoning their property in the wreck, *relieve themselves of the duty* to light and mark the wreck *by giving notice* to those upon whom that duty is cast by the law; or to the local authority assuming or apparently having power to deal with the wreck"[10] (emphasis added).

In 1915 this Court in *The Plymouth*, 225 F. 483 (2 Cir.), expressly followed the leading English case of *The Douglas*:

> "There is no American authority on the subject, but we think *The Douglas*, 7 Prob. Div. 151 (1882)

8. *The Douglas*, [1882] 7 P.D. 151; *The Utopia* [1893] A.C. 492.

9. Marsden, *The Law of Collisions at Sea* (4 British Shipping Laws) (1961).

10. Marsden, *supra*, at p. 80.

> exactly in point. * * * The Douglas was sunk in a collision as the result of the negligence of her master, who instructed a tug to request the harbor master to take care of the wreck. The harbor master promised to do so, but neglected to place lights for several hours, within which time the Mary Nixon, without fault on her part, ran into the wreck and sustained damage. It was held by the Court of Appeals that the master and mate of the Douglas had a right to rely upon the harbor master's doing his duty, and that the owners of the wreck were in no way responsible for the accident." 225 F., at p. 485.

Except for one plainly erroneous distinction of the English cases on the *facts*[11], the majority opinion's version of the English *rule* does not differ from the above in any way important to this case.

The majority opinion concludes that "mere notice" to Government authority is "not enough" under these leading English cases to relieve an owner from his obligation to locate and mark a wreck;[12] significantly, the opinion concludes that, under the English authorities, "an owner is only relieved of responsibility after the public authority has *taken action to take over the marking of the wreck*"[13] (emphasis added). The majority opinion then refers to United States decisions which the opinion states show that our Courts have "*similarly* recognized that an owner's duty to mark a wreck ceases once the Coast Guard has *undertaken the task*"[14] (emphasis added).

The majority points out that "any difference between the general maritime law as interpreted and applied in the

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11. The majority's purported distinction of the leading English cases on the basis that the public authorities concerned had "assumed complete physical control" (Majority Opinion, note 6, p. 4383) is plainly wrong. The report of *The Douglas* specifically states that ". . . the officers of the Thames Conservancy had *not* taken possession of her." (emphasis added). [1882] 7 P.D., at p. 152.

12. Majority Opinion, note 6, p. 4383.

13. *Id*, p. 4384.

14. *Id*. This correctly states the *English* law, which was applied by the United States Courts *until but not after Berwind-White* (*supra* note 2, pp. 3, 4; *infra* Point II, pp. 6-8).

United States and England will affect plaintiff's right of recovery only if it could be shown that [Texaco] had negligently failed to take some action which would have prevented the Brandenburg from running into the wreck of the Texaco Caribbean *after* [*Texaco*] *had notified Trinity House* of the collision."[15]

But that is exactly the situation in the present case. As stated in the majority opinion,[16] Trinity House was notified of the Paracas/Texaco Caribbean collision by Texaco while the stern section of the wreck was still afloat. In response thereto, Trinity House dispatched its ineffective ship Siren.[17] The record reflects that the Siren (which *never* located the wrecked Texaco Caribbean[18]) departed at 0752 a.m. 11 January 1971[19]—a few hours after the collision, more than six hours before the stern section sank, *and almost 24 hours before the Brandenburg struck the sunken wreck and sank at 0730 12 January 1971.*[20] There was thus *more than ample time* after notification of Trinity House for wreck owner Texaco, which *refused*[20a] subsequent offers of specially equipped wreck-locating salvage vessels which could have located its wreck before the Brandenburg was lost, independently to have located and marked its wreck.[21]

However, since Trinity House on Texaco's notice "undertook the task", and indeed in dispatching Siren had "taken action to take over the marking of the wreck,"[22] therefore wreck owner Texaco—even on the facts contended for by Brandenburg plaintiffs—would be exonerated under English law as correctly interpreted by the majority opinion.

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15. Majority Opinion, p. 4384.
16. Majority Opinion, p. 4377.
17. Accurately described as "pathetic", Dissenting Opinion, note 1, p. 4388.
18. A. 274a, 283a.
19. A. 77a, 78a.
20. A. 272a.
20a. A. 269a, 272a, 282a.
21. A. 274a, 283a.
22. Majority Opinion, note 6, p. 4383.

In stark contrast, Brandenburg plaintiffs have a right of recovery under the law of this Circuit as revised in 1951.

POINT II

The majority opinion is in direct conflict with this Court's landmark 1951 decision, which *expressly rejected* the previously applied English rule that a shipowner's "duty to mark a wreck ceases once the Coast Guard has undertaken the task."

The majority opinion denies the distinction between United States and English law, because the opinion completely overlooks the dramatic change made in the law of this Circuit in 1951 by *Berwind-White Coal Mining Co.* v. *Pitney*, 187 F. 2d 665 (2 Cir. 1951), and erroneously cites *Berwind* [as well as *Morania Barge No. 140, Inc.* v. *M & J Tracy Inc.*, 312 F. 2d 78 (2 Cir. 1962)] in support of the very proposition which *Berwind* overruled and supplanted.[23]

The last paragraph of the majority opinion's discussion in footnote 6, page 4384, correctly points out that this Court's 1915 decision in *The Plymouth* (225 F. 483), and 1927 decision in *New York Marine Co.* v. *Mulligan* (31 F. 2d 532), approved the rule of the leading English case of *The Douglas*—that the mere fact that a governmental authority simply accepts responsibility relieves a shipowner of any further duty to locate and mark his wreck.[24]

However, the *next* two cases cited in footnote 6 (page 4384)—*Berwind-White* and *Morania*—do *not* support the majority opinion's statement that the United States Courts follow the old English rule. On the contrary, they *specifically rejected* that rule, and established a new and beneficent policy in the law of this Circuit. These two decisions wisely held shipowners *independently responsible* to locate and mark their wrecks, without regard to governmental undertakings, until *actual marking* by the Governmental authority *had been completed.*

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23. Majority Opinion, note 6, p. 4384.

24. As noted *supra* pp. 3, 4, in *The Plymouth* this Court stated the rule of *The Douglas*, and *followed* it.

In the pivotal 1951 case of *Berwind-White Coal Mining Co.* v. *Pitney*, 187 F.2d 665 (2 Cir. 1951), the Coast Guard had been notified of the wreck, and was actively, although unsuccessfully, engaged in searching for it.[25] Under the English rule of *The Douglas*, as formerly approved by this Court in *The Plymouth* and *New York Marine Co.* v. *Mulligan* among others, this notification when accepted by the Coast Guard *would have absolved* the owners from any further duty to protect the public, despite the ineffectual search.

But this Court *rejected* its earlier *dicta*, and with them the English rule:

> "Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability * * * *the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark.*" (emphasis added) 187 F.2d at 669.
>
> This Court then continued that *dicta* in earlier cases ". . . which may indicate the contrary *should be discounted accordingly.*" (emphasis added) *id.*

Thus *Berwind-White* and *Mulligan*—erroneously string-cited in the majority opinion as supporting the English rule adopted in 1915 in *The Plymouth—in fact do exactly the opposite;* they expressly establish a new and more enlightened rule designed to protect innocent shipping by requiring wreck owners, regardless of unsuccessful governmental efforts, to continue searching for their dangerous navigational obstructions *until actually marked.*

Thus Judge Leonard T. Moore (sitting by designation in *Marine Towing Inc.* v. *Red Star Towing & Transportation Co.*),[26] following careful analysis of *Berwind* and *Morania*, held that the ship-owner's duty to mark had not ceased where the Coast Guard had not yet "actually marked the wreck with its own buoy",[27] *even though* the

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25. ". . . while the [U.S.C.G.] patrol boat was searching for the wreck, the tug . . . struck it and was damaged." 187 F.2d, at p. 668.

26. 1974 A.M.C. 691 (E.D.N.Y. 1973); *see* Brandenburg Plaintiffs' Reply Brief, p. 11.

27. 1974 A.M.C., at p. 694.

Coast Guard had in fact temporarily hung both a flag and a lantern on the mast of the wrecked vessel,[28] *and* the wreck's owner had left the area "with the knowledge that a Coast Guard buoy tender was due to arrive at any moment to place a large wreck buoy over the *Ocean Queen.*"[29] The Court held that the wreck owner's continuing duty would not end until the Coast Guard "had marked the wreck with a more permanent buoy."[30]

POINT III

Justice requires that jurisdiction be retained here, in the only forum providing plaintiffs *any* remedy.

The pertinent facts, for the purpose of this appeal, are that:

a. Wreck owner Texaco admittedly advised British governmental authority (Trinity House) prior to 0752 11 January 1971 of the wrecked Texaco Caribbean;[31]

b. Trinity House's efforts were ineffectual;[32]

c. Wreck owner Texaco did nothing further to locate or mark its wreck, and in fact *refused*[33] offers of a private salvage vessel which could have located it *prior* to the Brandenburg's loss the following day;[34]

d. 24 hours after wreck owner Texaco's notice to Trinity House, the Brandenburg and cargo ran upon the unlocated wreck of the Texaco Caribbean, at 0730 12 January, 1971.[35]

Under English maritime law,[36] as the majority opinion in effect agrees, wreck owner Texaco's simple notice and

28. *Id.*
29. *Id.*
30. 1974 A.M.C., at p. 695.
31. A. 77a.
32. A. 272a; Majority Opinion, pp. 4377-8; Dissenting Opinion, note 1, p. 4388.
33. A. 269a, 272a, 282a.
34. A. 274a, 283a.
35. A. 272a; Majority Opinion, p. 4378.
36. *The Plymouth*, 225 F. 483 (2 Cir. 1915), analyzing and applying *The Douglas*, [1882] 7 P.D. 151, 158, 160; *The Utopia* [1893] A.C. 492, 497. Marsden, *The Law of Collisions at Sea* (4 British Shipping Laws) p. 80 (1961).

Trinity House's ineffectual acceptance thereof relieve Texaco of any liability for failure to mark its wreck, thus depriving Brandenburg plaintiffs of any and all remedy if remitted to the English forum.

In contrast, under the law of this Circuit in effect since 1951 (overlooked and ignored by the majority opinion) the duty of wreck owner Texaco to locate and mark *continued despite* Trinity House's ineffective undertaking of the task of locating and marking. Further, it continued *until the Trinity House buoy actually went down*[37], an event which only occurred *after* the loss of the Brandenburg, and *after the very salvage vessel* rejected by Texaco found the Texaco Caribbean wrecks, and told the Siren—still searching—of their positions.[38]

Under the facts of this case and the law of this Circuit, Brandenburg Plaintiffs thus *have* a remedy for Texaco's failure independently to locate and mark its wreck. They have *none* in England. This case is therefore not controlled by the authorities discussed in the majority opinion, in which "the law applicable in the alternative forum may be less favorable to the plaintiffs' chances of recovery."[39]

The comment in Judge Mansfield's concurring opinion filed July 8, 1975, that jurisdiction should not be retained

> ". . . merely because of the possibility that our federal courts might interpret general maritime law more favorably to their cause or award more liberal damages to them than would the High Court of England,"

is also inapposite. This case is not a matter of *more* or *less* favorable law. There is *no* remedy whatsoever for plaintiffs under English maritime law.

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37. *Berwind-White Coal Mining Co.* v. *Pitney*, 187 F.2d 665, 669 (2 Cir. 1951); *Morania Barge No. 140, Inc.* v. *M & J, Tracy Inc.*, 312 F.2d 78 (2 Cir. 1962); *Marine Towing Inc.* v. *Red Star Towing and Transportation Co.*, 1974 A.M.C. 691, 694-5 (E.D.N.Y. 1973).

38. A. 274a, 283a.

39. Majority Opinion, p. 4384.

It would not, we respectfully submit, "emasculate" *forum non conveniens* to hold that it is a condition precedent to application of the doctrine that there be *two* available forums providing plaintiff with *effective* remedies.

The majority opinion, thus having erroneously concluded that the English law was not established and that the English law was in any event not different from that of the United States, naturally never reached or dealt with the main thrust of this appeal. The opinion concluded that plaintiffs "will not be significantly inconvenienced by dismissal", and found "minimal possibility that plaintiffs might be adversely affected."

The correct legal conclusion—that being sent to England would deprive plaintiffs of *all* remedy—would naturally require drastic modification of these statements, and we submit of the Court's holding.

Brandenburg plaintiffs respectfully request that this Court rehear this appeal in banc in view of the clear errors of law in the majority opinion, and enter its order that jurisdiction be retained, and that the Magistrate's dismissal recommendation (approved without comment below) should be reversed as a matter of law, with instructions that the case be retained for trial on the merits.

Dated: July 9, 1975
New York, New York

Respectfully submitted,

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